

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

In the Matter of:

DELPHI CORPORATION

Debtor.

U.S. Bankruptcy Court

## One Bowling Green

New York, New York

November 6, 2008

10:09 a.m.

## B E F O R E :

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

2

1

2 HEARING re Motion of AMLP and ADAH to Reargue and Strike (in re  
3 Delphi Corporation v. Appaloosa Management L.P. et al.)

4

5 HEARING re Motion of AMLP and ADAH to Reargue and Strike (in re  
6 Delphi Corporation v. UBS Securities LLC)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1

2 A P P E A R A N C E S :

3 FRIEDMAN KAPLAN SEILER & ADELMAN LLP

4 Attorneys for Debtor

5 1633 Broadway, 46th Floor

6 New York, NY 10019

7

8 BY: EDWARD A. FRIEDMAN, ESQ.

9 WILLIAM P. WEINTRAUB, ESQ.

10

11

12 WHITE & CASE LLP

13 Attorneys for Appaloosa Management L.P.

14 1155 Avenue of the Americas

15 New York, NY 10036

16

17 BY: GLENN M. KURTZ, ESQ.

18

19

20

21

22

23

24

25

1

P R O C E E D I N G S

2

THE COURT: Be seated. Okay, I've -- oh, I'm sorry.

3

We're, first, on the record in Delphi v. Appaloosa Management L.P., et al. on Appaloosa and ADAH's motion to reargue and vacate a portion of my order granting, in part, and denying, in part, the defendant's motions to dismiss.

7

And I know I didn't suggest to you all that I would contemplate oral argument on this additional issue but I did have a couple of questions of each of you, and let me ask those now. And then I'll give you all a brief time for oral argument.

12

The Appaloosa briefs and the case law point out that one of the elements of a fraudulent omission claim is that the defendant have a duty to disclose. Appaloosa and ADAH contend that there is no duty to disclose set forth in the complaint that I have sustained and, in particular, point out that I found that the parties acknowledged that they were dealing with each other at arm's length and disavowed any fiduciary duty that either would have to the other.

20

But my question for Appaloosa is why wouldn't 6(d) of the EPCA, which has the reasonable best efforts language in it to implement the transaction, constitute the duty? I.e., given that undertaking and given the allegations of behind-the-scenes efforts to subvert the deal, why wouldn't that provision impose a duty to disclose?

1 I don't know if you or Mr. Shore -- whoever wants to  
2 handle that.

3 MR. KURTZ: Should I take --

4 THE COURT: Wherever you're comfortable.

5 MR. KURTZ: Glenn Kurtz, on behalf of ADAH and AMLP.  
6 Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. KURTZ: Your Honor's already determined that the  
9 applicable law here is Michigan law. And Michigan law  
10 recognizes a duty to disclose under fairly limited  
11 circumstances, unlike New York and some of the other  
12 jurisdictions that have been cited by Delphi. And,  
13 specifically, it's not enough to not omit. There has to be an  
14 active concealment. It requires a specific inquiry as to a  
15 subject matter, a response to the subject matter which is  
16 misleading and is a misrepresentation, and then you look at it.

17 The duty issue, Your Honor, is that under Michigan --

18 THE COURT: Isn't that based on cases where there  
19 specifically were facts where there wasn't this type of  
20 contractual obligations? And weren't they situations where  
21 people were dealing with each other and it's just a question of  
22 dealing with each other in good faith as opposed to a specific  
23 undertaking?

24 MR. KURTZ: But there's no specific undertaking in  
25 the EPCA to make disclosures as to matters that I would like to

1 address at some point today. The duty has to rise independent  
2 of the contract. That's what the law says.

3 THE COURT: Well, what --

4 MR. KURTZ: Otherwise it's a breach of contract. A  
5 breach of the best efforts provision is a breach of contract  
6 claim. It can't become a tort claim by simply saying well, by  
7 breaching the best efforts provisions you've breached the  
8 contract and therefore you've breached a duty and therefore  
9 you've committed fraud. It's specifically prohibited, right?  
10 You've got -- and New York law is clear on this as well when it  
11 comes to the limitation on liability, that you can't have tort  
12 claims arising out of a specific breach of contract.

13 Now, I know Your Honor left that open with respect to  
14 an intent to perform with respect to matters that occurred  
15 prior to execution, post-execution. Best efforts to take  
16 action in connection with the EPCA doesn't say you have to  
17 disclose. And it's important to focus on what the disclosure  
18 would be here because Your Honor upheld all of the claims at  
19 issue on the basis of allegations that there had been some  
20 affirmative effort to chill the financing.

21 THE COURT: And I don't want to get into that --

22 MR. KURTZ: Okay.

23 THE COURT: -- at this point. I just want to deal  
24 with this --

25 MR. KURTZ: But that is --

1 THE COURT: -- this particular issue.

2 MR. KURTZ: But then what, Your Honor, would be  
3 disclosed? Because the only allegations that they have, that  
4 they claim they can particularize, which is footnote 7 of their  
5 last submission, involves the consideration of whether or not  
6 to breach a contract as if consideration is actionable, as if  
7 there is supposed to be --

8 THE COURT: I've already dealt with that. I'm asking  
9 you a specific question, and I want to pursue that before  
10 you --

11 MR. KURTZ: Okay.

12 THE COURT: -- go off on other tangents.

13 MR. KURTZ: I apologize, Your Honor.

14 THE COURT: Paragraph 6(d) says, "Each investor shall  
15 use his reasonable best efforts to take all actions and do all  
16 things reasonably necessary, proper or advisable on its part  
17 under the agreement to cooperate with the company and to  
18 consummate and make effective the transactions contemplated by  
19 this agreement." And the allegation is that rather than trying  
20 to consummate the agreement, Appaloosa discussed with the  
21 initial -- I'm sorry, with the other investors, the additional  
22 investors, in various contexts, and we can get into those in a  
23 moment, but I just want to focus on this point first, the  
24 opposite, i.e., not consummating the agreement, not making the  
25 transactions effective but doing just the opposite and not

1 disclosing such information to Delphi, which suggests to me  
2 that the obligation was not lived up to.

3 MR. KURTZ: But, Your Honor, that is a contract  
4 provision. Every contract has a requirement that a party  
5 consummate the contract. That's what the agreement is; it's  
6 the purchase of goods.

7 THE COURT: No, but this is beyond that. This is a  
8 specific duty to cooperate.

9 MR. KURTZ: Well, it's a duty to cause the  
10 occurrence, perhaps, of the closing. And the allegation is  
11 there was a consideration by the parties that they wouldn't  
12 close and that they would share in some way any breakup fee  
13 that was required on the basis of a willful breach. That's no  
14 different than any contract claim where you simply don't close.  
15 That doesn't give rise to a tort duty. It's not independent of  
16 the contract; it is the contract.

17 THE COURT: Well, except this is a specific  
18 provision, separate and apart from just an undertaking to  
19 perform the contract, which is that the investors will work  
20 with Delphi to consummate and make effective the transaction.  
21 It was clearly under the agreement. It's set forth in 5(q).  
22 Delphi was aware of the additional investors because it  
23 provided that the information be funneled to them through ADAH.  
24 So it was clearly contemplated. The additional investors were  
25 important in that ADAH had some role as the leader, in essence,

1 of that effort to get them to perform.

2 I guess I don't see why the alleged nondisclosure of  
3 the contrary isn't a breach of a duty. Now, I understand you  
4 say it's a breach of a contract, I understand that, but the  
5 duty requirement is not limited to a fiduciary duty, is it?

6 MR. KURTZ: Well, under Michigan law, which is  
7 applicable, it is effectively limited to a fiduciary duty.

8 THE COURT: Well, but even -- but Michigan law  
9 recognizes that if one party expects the other party --  
10 reasonably expects the other party to make a disclosure, then  
11 the other party should do so, right? I mean, that's underlying  
12 those cases, isn't it, that the question needs to be asked?  
13 But if you ask the question of someone and they don't answer  
14 it, then your reasonable expectations are undercut. Clearly,  
15 the cases say that, without more, the defendant doesn't have to  
16 volunteer superior information. But here, in 6(d), didn't  
17 Delphi actually bargain for more?

18 MR. KURTZ: No, I --

19 THE COURT: And didn't the investors actually take on  
20 that additional duty?

21 MR. KURTZ: Your Honor, if there is a breach of the  
22 duty of best efforts, it's a contract provision; it's a breach  
23 of contract. There's not a case I'm aware of anywhere,  
24 Michigan or otherwise, that would suggest that a breach of the  
25 contract term would independently be a duty that would support

1 a fraud claim.

2 THE COURT: No, but I'm not saying that the breach  
3 itself is the fraud claim. I'm saying that that's the duty and  
4 that, of course, you have to have the other aspects too.

5 MR. KURTZ: Your Honor, a best efforts provision is  
6 not more than a contract provision to close; it's, in fact,  
7 less, right? The most you can get is "you shall pay me money  
8 on a date served." When you can't get that for some reason, or  
9 to supplement that you add in a best efforts provision, which  
10 is -- you're not obligated to do it no matter what, you're not  
11 in breach, but you do have to use efforts to try to get there.  
12 It's a lesser obligation.

13 When people are negotiating transactions, they try to  
14 get "you shall obtain regulatory approval". Everybody pushes  
15 and says well, it should be a best efforts provision because  
16 what if I'm not successful? It's not more; it's less.

17 THE COURT: All right. Well, let's use that  
18 hypothetical. You enter into a best efforts agreement with me  
19 that we'll use our mutual best efforts to get HSR approval.

20 MR. KURTZ: Yes.

21 THE COURT: Unbeknownst to me, you go to the  
22 regulatory authorities and say, you know, this agreement was  
23 really a restrain in trade and it's going to create a monopoly  
24 and, you know, I don't know why we entered into it but you  
25 better disapprove it. You don't think that you would have an

1 obligation to disclose to me that you -- a duty to disclose to  
2 me that you did that --

3 MR. KURTZ: Your Honor, I think that would be a --

4 THE COURT: -- so that I could correct it, so I could  
5 go to the -- I could go to the regulators and say you know why  
6 they're doing this? It's because they want to get out of the  
7 deal. It's not because of your job but because there's  
8 something secret going on. I don't have the ability to do  
9 that --

10 MR. KURTZ: Well, I --

11 THE COURT: -- even though you've said you'd use your  
12 best efforts to go get regulatory approval.

13 MR. KURTZ: Yeah, I think you're articulating a  
14 breach of the best efforts provision, not a fraud claim. I  
15 would point out that in these circ -- well, let me modify your  
16 hypothetical just a bit to be a little closer to the facts  
17 here. Then the FTC turns around and says you're wrong and I'm  
18 going to approve it, and they satisfy that condition. And then  
19 you don't close. There'd be no causation, obviously, between  
20 what you've articulated and what the breach is. You can't have  
21 a fraud claim based on an unsuccessful effort to --

22 THE COURT: No, I understand, but all I'm focusing on  
23 is the duty aspect.

24 MR. KURTZ: I understand. I wanted to keep it in  
25 context, but --

1 THE COURT: And I'm just -- I've just --

2 MR. KURTZ: Yeah.

3 THE COURT: -- I'm --

4 MR. KURTZ: I don't believe there are any cases which  
5 suggest that you can have a duty for purposes of a fraud claim  
6 in silent fraud, under Michigan law, arise by reason of a  
7 contract term. I think that is precisely a contract breach,  
8 and I don't think it turns on anything else. And, in fact,  
9 Your Honor, when I have a moment to grab a case, I'd like to  
10 cite it to you. It's a Michigan Appellate Court case. It  
11 speaks -- it basically adopts Briefstein and tells you that you  
12 can always breach and you don't impact the measure of damages  
13 by that; it's still a contract claim. So it might be relevant  
14 to your thinking to the extent that you're going to permit  
15 anybody to lever a contract term to create a duty, I think,  
16 that has to be outside of the contract to satisfy fraud claims.

17 THE COURT: Okay. All right. Let me hear from the  
18 debtors on this point. I think the argument that I want you to  
19 address is whether Michigan's somewhat more nebulous version of  
20 Bridgestone/Firestone means that, in addition to one not being  
21 able to sue for an intent to breach of contract, except in very  
22 limited circumstances, one cannot assert a duty under a  
23 contract as a basis for an obligation to disclose. It has to  
24 be some noncontractual duty.

25 MR. FRIEDMAN: I don't see anything, Your Honor, in

1 Michigan law that would alter this aspect of the analysis as to  
2 duty. What I mean by that is in cases that were discussed on  
3 the record on October 8th, those cases make clear that there  
4 are a number of circumstances which can give rise to a duty to  
5 speak. As I understand the Michigan case law that's cited by  
6 Appaloosa, Michigan seems to be more restrictive in terms of  
7 whether there can be a duty merely based on the superior  
8 knowledge --

9 THE COURT: A duty to volunteer.

10 MR. FRIEDMAN: Yes, exactly. Exactly. Merely based  
11 on the superior knowledge of the defendant. The Michigan cases  
12 cited by Appaloosa do not seem to change, in any way, my  
13 understanding of the law in New York and other jurisdictions  
14 that where a party has made partial or ambiguous statements,  
15 the duty to speak can arise from the misleading impression  
16 created by those statements.

17 So in this case, even before we come to the  
18 reasonable best efforts provision in the EPCA, we have, whether  
19 it's New York law or Michigan law, we have David Tepper's sworn  
20 testimony and his commitment to the deal that was relied upon  
21 by all of the stakeholders in this case and formed the basis  
22 for the Court's approval of the EPCA and Delphi's entry into  
23 the EPCA.

24 Then at about that same time, or within weeks  
25 thereafter, that is, at about the same time Appaloosa is

1 committing to the transaction, we learn, and it is alleged in  
2 the complaint, that Appaloosa was engaged in efforts with the  
3 additional investors to avoid a closing and subvert a closing  
4 under the EPCA and consummation of the plan.

5 So we would argue that under Michigan law or under  
6 any law, having made the affirmative misrepresentations that  
7 are alleged in the complaint, when Appaloosa embarks on a  
8 course of conduct with the additional investors, that's  
9 directly contrary to the affirmative representations that were  
10 made. The duty to speak can be predicated on what would be  
11 viewed as partial or misleading affirmative representations.

12 So to the extent that Michigan law says merely having  
13 superior knowledge does not give rise to a duty to speak, I do  
14 not believe that that undermines the sufficiency of Delphi's  
15 allegations here.

16 In addition, we believe that paragraph 6(d) of the  
17 EPCA, which is an agreement entered into by the parties and  
18 approved by this Court, imposes an obligation on Appaloosa to  
19 use its reasonable best efforts to consummate the transaction.  
20 That means, we would submit, that there's no -- let me say it  
21 this way, Your Honor, if I may. There's no specific  
22 enumeration in 6(d) as to what particular steps or actions  
23 Appaloosa is required --

24 THE COURT: No, but I think the point that Mr. Kurtz  
25 is making is that this is a contract provision. If we breached

1 it by not revealing actions taken to the contrary of this  
2 provision, then sue us for breach, but you can't sue us for  
3 fraud for having to -- for not revealing or for omitting to  
4 reveal the communications.

5 MR. FRIEDMAN: Well, I understand their argument,  
6 Your Honor, but Delphi is not suing for fraud based on the  
7 breach of the best efforts provision. There are certain  
8 elements of a fraudulent omission claim, which we believe we've  
9 alleged sufficiently, and one of those elements is is there a  
10 relationship giving rise to a duty to speak? That relationship  
11 can be found here independent of the EPCA. The provision in  
12 6(d) just reinforces what would be the case in any event. What  
13 I mean by that is that the provision in 6(d) imposes an  
14 obligation and a duty on Appaloosa to speak. That does not  
15 mean that a breach of contract claim is being converted into a  
16 fraud claim. Under these circumstances, there would be a fraud  
17 claim based on the fraudulent omission even if Section 6(d) did  
18 not exist in the EPCA. The duty to speak would arise from the  
19 affirmative representations that were made by Appaloosa and  
20 David Tepper that create a misleading impression when Appaloosa  
21 embarks on a course of conduct to subvert the EPCA.

22 So we submit that the duty to speak is established  
23 based on the allegations of the complaint independent of the  
24 EPCA. In addition, we think when the provisions of 6(d) are  
25 read, that dispels any possible question about the conclusion

1 because this is a situation where Appaloosa affirmatively  
2 undertook an obligation to use best efforts, which, in these  
3 circumstances, we submit --

4 THE COURT: Well, let me ask you this. How is this  
5 different from the following situation, which we know doesn't  
6 give rise under Michigan law to a fraud claim? Parties enter  
7 into an agreement. At the time they enter it, they do intend  
8 to perform. I'm leaving aside the testimony by Tepper here.  
9 I'm just focusing on this provision that's giving rise to a  
10 duty. Parties enter into an agreement at time X, and at that  
11 time they both intend to perform. Two months later, there's a  
12 material change in circumstances. One party loses a lot of  
13 money and isn't really able to perform. Rather than telling  
14 its contract party that fact, it just goes along towards the  
15 date of the closing and on the date of the closing fails to  
16 close. Now, they have an agreement, and it's been breached,  
17 but it would seem to me that that would not give rise to a  
18 fraud claim. How is this different than that?

19 MR. FRIEDMAN: As I understand Your Honor's  
20 hypothetical, we're now talking about a situation where we're  
21 assuming --

22 THE COURT: Let's assume for the moment that at the  
23 time of entering into the agreement, or shortly, very shortly,  
24 thereafter, there was no optionality, the parties intended to  
25 perform, both sides, but then one party formed the intention

1 later not to perform, didn't tell the other party and  
2 eventually breached. And the other party says, well, not only  
3 is there a breach but you defrauded me by not telling me. How  
4 is that different than having a reasonable best efforts  
5 provision, forming an intention later not to perform and not  
6 performing and not disclosing it?

7 MR. FRIEDMAN: I think that merely forming an  
8 intention not to perform and keeping that secret is different  
9 from the present case in two respects. The first is, in the  
10 present case, we have affirmative representations --

11 THE COURT: Okay. Well, leave that aside, though.

12 MR. FRIEDMAN: -- which we're excluding in this  
13 hypothetical.

14 THE COURT: In my hypothetical I'm excluding that.

15 MR. KURTZ: And also in the present case we don't  
16 have merely a change in the state of mind; we have a concerted  
17 course of activity.

18 THE COURT: Okay, but it's still -- it would still --  
19 either one would give rise to damages. Either one, the  
20 contract party is relying upon the deal happening, taking steps  
21 in reliance thereon, including cutting other deals with people,  
22 incurring money to finance other aspects of the business in  
23 reliance on this deal, all of that sort of thing. So the  
24 information is important in each case.

25 MR. FRIEDMAN: Well, I would think what Your Honor's

1 hypothetical illustrates is the importance to a party in  
2 Delphi's position of the best efforts clause and the relevance  
3 of it in this situation, because from the perspective of Delphi  
4 I do not agree with Mr. Kurtz that the best efforts clause is  
5 simply something less than the obligation to perform. It is a  
6 contractual obligation.

7 So with respect to Your Honor's hypothetical, if  
8 there's a breach of the best efforts clause along the way, for  
9 example, with respect to the example of the FTC, the failure to  
10 honor the best efforts clause deprives the plaintiff of the  
11 ability to take action that might address what otherwise is a  
12 harm being suffered. And then we get into issues of causation  
13 and damages, which I think are separate from the simple  
14 question -- I shouldn't say simple, which are distinct from the  
15 question of whether there is a duty to speak. So --

16 THE COURT: Okay. Okay. I'm going to let you come  
17 back to this, Mr. Kurtz, but the other question I had is really  
18 one of the debtors since they're up at the podium. Since  
19 Mr. Friedman's up at the podium, let me ask it of you.  
20 Paragraph 78 of the complaint says that Appaloosa remains  
21 legally responsible for the misconduct of the additional  
22 investors. What in the -- what is the basis for that statement  
23 that's either in the complaint itself or incorporated in it by  
24 reference to the underlying documents?

25 MR. FRIEDMAN: In the agreements, that is, the EPCA

1 and the additional investor agreements, Appaloosa has the right  
2 to bring in additional investors. Delphi does not have a  
3 direct relationship with the additional investors. Our  
4 assertion is that from this structure, that when Appaloosa  
5 brings in additional investors to take on part of Appaloosa's  
6 financial obligation and these additional investors commit as  
7 they do in the additional investor agreement to -- and I don't  
8 remember the exact provision but it's something in the nature  
9 of honoring the obligations in the EPCA, as I recall it,  
10 Appaloosa cannot walk away from its obligations in the EPCA by  
11 transferring financial responsibility to the additional  
12 investors.

13 So we would argue that if Appaloosa lays off, as it  
14 did, a substantial part of its financial commitment, Appaloosa  
15 cannot then say, well, whatever these additional investors do,  
16 Delphi, you don't have a claim against them and it's not our  
17 problem if they engage in conduct that subverts the closing of  
18 the EPCA and the consummation of the plan.

19 THE COURT: Well, I understand that the documents  
20 keep Appaloosa -- well, ADAH and then Appaloosa on the hook for  
21 the investment even if the additional investors don't perform,  
22 but I don't see how one can extrapolate from that to the  
23 proposition that Appaloosa is also on the hook for the  
24 misconduct of the additional investors as opposed to just being  
25 on the hook for the amount that it agreed to invest.

1                   MR. FRIEDMAN: I would say to that, Your Honor, the  
2 extent to which Appaloosa is on the hook for the misconduct of  
3 the additional investors will depend on the extent to which the  
4 allegations are proved where we have alleged that Appaloosa was  
5 engaged in active --

6                   THE COURT: No, I understand, and we'll talk some  
7 about how much the complaint says Appaloosa knew about this,  
8 but this statement seemed to make sort of a separate point,  
9 which is that even if -- I inferred from it the statement that  
10 even if Appaloosa didn't know about any of this, it would be  
11 legally responsible for it. And I couldn't see anything in the  
12 agreements other than misuse of information, which, in 5(q),  
13 would potentially impose that type of liability on Appaloosa.

14                  MR. FRIEDMAN: And I understand that, Your Honor, and  
15 I'm also not sure at all if there's anything in the agreement  
16 that would say if an additional investor engages in bad conduct  
17 that Appaloosa has no involvement in or no knowledge of, that  
18 Appaloosa is, in effect, absolutely liable for what an  
19 additional investor does. So I would agree with that.

20                  THE COURT: Okay. But -- so you're not aware of any  
21 provision of the agreement that makes Appaloosa the additional  
22 investor's agent or proxy or anything like that?

23                  MR. FRIEDMAN: For the purposes we're discussing  
24 here, Your Honor, that is, if the additional investor engages  
25 in bad conduct, then Appaloosa has no knowledge or

1 participation.

2 THE COURT: Okay. All right. Well, I'm not sure you  
3 have to respond on that point then, but if you want to, you  
4 can.

5 MR. KURTZ: Your Honor, as you point out, it's not  
6 necessary. I would just add one proposition of law into that,  
7 which is if you bring a fraud claim or a tort claim, the law is  
8 a hundred percent clear that you have to identify the fraud by  
9 each individual actor. You don't get a contract principle of  
10 liability. You have to -- in fact, you have all those cobbling  
11 cases where they say you have to identify each defendant and  
12 what each defendant did and said and it's insufficient to use a  
13 legal conclusion like legally responsible.

14 Going back to the duty issues, Your Honor, I thought  
15 it made sense, and I think it's sort of cleanest, to cite and  
16 quote from some of the Michigan cases because I don't think  
17 that there's anything open to Michigan law on this concept.  
18 It's -- Michigan law doesn't recognize failures to speak;  
19 Michigan law recognizes misleading statements in response to a  
20 specific inquiry.

21 So, for instance, in the McConkey case, which was  
22 specifically cited as the correct law by the Michigan Supreme  
23 Court in the Hord case, it says that in an action of deceit  
24 it's true that silence as to a material fact is not  
25 necessarily, as a matter of law, equivalent to a false

1 misrepresentation, but mere silence is quite different from  
2 concealment. The gist of the action is fraudulently producing  
3 a false impression upon the mind of the others. And it goes on  
4 to say what's required is that there be a specific inquiry and  
5 a specific response.

6 In the Hutasari (ph.) case --

7 THE COURT: No, but Michigan law does recognize the  
8 concept of fraudulent omission, right?

9 MR. KURTZ: Fraudulent concealment, not fraudulent  
10 omission. They say there must be -- here's a quote, Your  
11 Honor, from the Hutasari case, which we've quoted: "There must  
12 be some type of misrepresentation, whether by words or action,  
13 in order to establish a claim of silent fraud."

14 If you look at the Buntaya (ph.) case, which is the  
15 Eastern District of Michigan, it tells you that the  
16 misrepresentation occurs when a party suppresses part of the  
17 trust when asked, not by mere nondisclosure.

18 And if you look at the Hord case --

19 THE COURT: Do any of those cases deal with a  
20 situation where there's a contractual duty?

21 MR. KURTZ: As I was trying to say before, I think  
22 all cases have a contractual duty. They all have a duty to  
23 close. And when somebody decides they're not going to close,  
24 they're not --

25 THE COURT: I'm not -- I don't buy your logic on that

1 one.

2 MR. KURTZ: But it then --

3 THE COURT: If that were the case, why would you even  
4 bother with a reasonable best efforts provision?

5 MR. KURTZ: Because there are some aspects of  
6 performance that can't be identified with particularity in a  
7 contract, like in regulatory approval where you say, well, I  
8 want you to return my calls, I want you to make sure you know  
9 what I'm doing.

10 I will say, Your Honor, that there's a real question  
11 as to the enforceability of a best efforts provision where it  
12 lacks objective criteria against which to measure performance,  
13 like the Timberline case in New York. There's some issue here  
14 as to when it's just void for vagueness. And what it's there  
15 to do is to make sure there's a cooperation, but it's not as  
16 strong a duty as there is to simply close, right? If you owe  
17 money and you don't provide the money at the time of the close,  
18 you have a breach. You can try to articulate it's a breach of  
19 best efforts, but it's no different whether you don't close  
20 because you don't give the money or you don't close because you  
21 didn't use your best efforts to give the money. I don't see  
22 why there's a difference in those principles.

23 THE COURT: Because there may be a fairly long time  
24 between the time you contract and the time you close when the  
25 other party may want to cover, may want to do something else if

1 you're not going to -- if you know you're not going to -- if  
2 you know you're not living up to the deal anymore.

3 MR. KURTZ: Understood, but that -- well, first, I  
4 mean, factually, Your Honor, the complaint itself pleads  
5 deficiency notices. Your Honor knows there was an 1142 motion.  
6 This whole idea that there was some expectation and statements  
7 and representations that haven't been identified with  
8 particularity, and I think Your Honor already so held that  
9 there would be a closing no matter what, sort of runs afoul of  
10 their own allegations in the complaint where they were saying  
11 that they had real questions as to whether there would be a  
12 closing. More significantly --

13 THE COURT: Where's that said in the complaint?

14 MR. KURTZ: Paragraph 85.

15 THE COURT: This is the argument over whether the  
16 financing is compliant?

17 MR. KURTZ: Well -- and the allegations of fraudulent  
18 omission are based on some alleged effort to chill and prevent  
19 that financing condition from being satisfied. They're now  
20 saying they've refrained from other -- what Your Honor just  
21 raised yourself was somebody has to have some notice that  
22 perhaps you're not going to perform. Well, they've pled that  
23 notice.

24 In either case, though, it becomes a breach of  
25 contract issue and it becomes a damages issue. It doesn't

1       become a fraud issue. And in that respect, Your Honor, I would  
2       cite you to another case, which I don't think we had otherwise  
3       brought to your attention, which is the Huron Tool case v.  
4       Precision. The cite for that is 532 N.W.2d 541. And in this  
5       case the Michigan Court of Appeals said that "[w]e hold that  
6       plaintiff may only pursue a claim for fraud in the inducement  
7       extraneous to the alleged breach of contract. Our holding  
8       heeds with the Supreme Court's admonition to avoid confusing  
9       contract and tort law. Damages of allowing contract law to  
10      drown in a sea of tort exists only where fraud and breach of  
11      contract claims are factually indistinguishable."

12                   So I don't see how one can turn a breach of a best  
13      efforts provision, alleged, into some kind of tort. And, in  
14      fact, if that were the law, Your Honor, then I don't know what  
15      case and what contract wouldn't give rise to tort claims.  
16      Certainly everyone with a best efforts provision would. If you  
17      breached your best efforts provision and did not tell anybody  
18      you were breaching, it's fraud. And I don't know why that  
19      wouldn't apply to claims without best efforts because you're  
20      still breaching your obligation to close.

21                   THE COURT: What's your response to that,  
22      Mr. Friedman?

23                   MR. FRIEDMAN: We're not alleging, Your Honor, that a  
24      breach of the best efforts provision is fraud. We're alleging  
25      that in a case where, as here, there's been a sufficient

1 allegation of fraud based on an affirmative misrepresentation,  
2 when that is followed by a course of conduct to subvert the  
3 EPCA, the reasonable best efforts provision makes clear what  
4 the law would provide in any event, whether it's Michigan law  
5 or any other law, that, having that made that affirmative  
6 representation, there's a fraudulent concealment claim that --

7 THE COURT: So it's not really -- the duty doesn't  
8 really come from 6(d) then.

9 MR. FRIEDMAN: My view, Your Honor, is that 6(d)  
10 confirms that there's a duty. I don't think we need to reach  
11 the question of whether 6(d), in and of itself, would impose a  
12 duty in the absence of affirmative misrepresentations or half-  
13 truths. I think we would have a good argument that it does,  
14 but I don't think the Court has to reach that argument here.

15 THE COURT: Okay.

16 MR. KURTZ: Your Honor, I would suggest that that's a  
17 tacit admission as to what Michigan law says, which is you have  
18 to base it off of a misstatement in response to an inquiry.  
19 And then the problem with this -- and bear in mind the  
20 allegations are a failure to disclose consideration of the  
21 potential for breaching, perhaps, if need be. There's no such  
22 thing, as far as I know, in commercial circles of a spontaneous  
23 breach. There is always some consideration as to whether you  
24 will perform or whether you will not perform, and that  
25 consideration is not actionable as fraud, and it doesn't add

1 anything to a breach of contract claim.

2 With respect to Mr. Friedman's effort to tie the  
3 omission to a misstatement, now, Your Honor has already found  
4 that the conclusory and unparticularized allegations in the  
5 fraudulent omission claim itself, that there was some kind of  
6 repeated representation about a commitment to close, was  
7 insufficient. I believe you reiterated that at the hearing on  
8 October 8th. And what Delphi is trying instead to attach  
9 itself to would be matters and statements that were made prior  
10 to the execution of the EPCA.

11 And I think Your Honor has already correctly ruled  
12 that you can't have a fraud claim on the basis of statements  
13 made after execution, and the obvious reason for that is you'll  
14 never get anywhere near causation or damages, in addition to  
15 the fact that you're restating contract and tort law. You're  
16 in a position where there's one -- there's no logic. What is  
17 there to disclose at the time that you've made the  
18 misstatement, the alleged misstatement, that you haven't had  
19 the subsequent consideration of a breach? So there was nothing  
20 to disclose. So if you're saying --

21 THE COURT: I'm sorry. I don't understand.

22 MR. KURTZ: At the time of the misstatement, you  
23 can't have -- you get an inquiry perhaps, which isn't even  
24 alleged here. Are you going to close? You get a response.

25 THE COURT: No, the inquiry was when I asked

1 Mr. Tepper are you behind this deal? That's what the debtor's  
2 relying on.

3 MR. KURTZ: Okay, but --

4 THE COURT: There's no other specific statement in  
5 the complaint that says -- that's been identified by a speaker  
6 or a place or time saying we still intend to close. So I think  
7 the debtor's relying on that.

8 MR. KURTZ: But I don't think the debtor has ever  
9 alleged that there was anything that was -- and certainly not  
10 with Rule 9 particularity, that there was anything that was  
11 going on at that time which would have rendered that  
12 misleading. In fact, debtors had already executed the EPCA,  
13 had already had board approval with respect to the EPCA and  
14 continued to move forward with the EPCA, notwithstanding their  
15 own pled deficiency notices with respect to Appaloosa's --

16 THE COURT: No, they're saying that it gave rise to a  
17 duty to disclose later something that was completely contrary  
18 to that stated.

19 MR. KURTZ: A consideration of a breach. In every  
20 case where there's a contract and there is a breach, somebody  
21 considers that before they actually move forward and effect a  
22 breach. In every case, there's never a spontaneous breach, or  
23 certainly not frequently and certainly not in commercial  
24 circles. So does that mean every time that somebody to a  
25 contract starts to consider do I want to close or do I not want

1 to close that there's a fraud claim on that basis? Because  
2 every contract contains an absolute statement that you're going  
3 to close. They all say on this date I will fund this money, I  
4 will buy this asset. There are commitments. There are  
5 statements. They are written down. They are particularized.  
6 But they don't give rise to a fraud claim simply because you  
7 start to think about the prospect of breaching.

8 And the case that -- the Huron case that I've just  
9 read makes clear --

10 THE COURT: No, I've dealt with all the Michigan  
11 cases. I understand --

12 MR. KURTZ: Okay.

13 THE COURT: -- the basis, under Michigan law, for  
14 when you can raise a fraud claim.

15 MR. KURTZ: Okay, but there was two alleged frauds.  
16 The one was the one Your Honor dealt with in --

17 THE COURT: At the time that he made the statement.

18 MR. KURTZ: Yeah. That's right. And then I have a  
19 move to reargue that. We have our views, and --

20 THE COURT: All right.

21 MR. KURTZ: -- we'll take it up at summary judgment,  
22 but --

23 THE COURT: So your point is that that statement  
24 didn't give rise to a duty later to inform Delphi that this was  
25 going on?

1                   MR. KURTZ: Correct, any more so than any other  
2 contract representation that I'm going to perform gives rise to  
3 a duty to disclose your internal considerations and  
4 deliberations about whether you will breach or not breach.  
5 That is far -- that is merging the law of fraud and contract  
6 far more than the other issue with respect to a present intent  
7 not to perform and whether that can be recharacterized as a  
8 present intent and therefore a misstatement. This is just  
9 simply saying when somebody in a normal commercial context  
10 starts to think about breaching and they don't come right out  
11 and say by the way, I'm thinking about breaching, I haven't  
12 made a decision but I'm thinking about it, that is fraudulent.  
13 It's a fraudulent omission claim. And under Michigan law, the  
14 law is basically crystal clear that silent fraud doesn't --  
15 isn't -- can't be based on an omission. It has to be based on  
16 an inquiry and a specific response that's misleading, and I  
17 don't know how it can be misleading in light of their own  
18 affirmative allegations here that they knew there was issues  
19 with respect to Appaloosa's ability or willingness to close.  
20 And they brought that to Your Honor's attention, so it's a bit  
21 wasteful in this context.

22                   And what I really -- if Your Honor has any questions  
23 on the duty, I'd be happy to respond. There were a couple of  
24 points, I thought, that were more dispositive of the issues  
25 here that I wanted to try to address.

1                   THE COURT: Well, okay. I guess this leads to my  
2 final question, which is, other than the contentions that deal  
3 with actual fraud, particularly given the law here as to the  
4 aspects of a fraud claim under Michigan law, why does Rombach  
5 v. Chang lead to the dismissal of the other claims?

6                   MR. KURTZ: Rombach makes clear what I think is made  
7 clear in many, many other cases as well, which is that Rule  
8 9(b) applies to all averments of fraud irrespective of the  
9 claim in which they are advanced, right?

10                  THE COURT: No, I understand that.

11                  MR. KURTZ: And so the question is are these fraud  
12 allegations? And as insufficient as they are, they are fraud  
13 allegations. And I think the reason that that's clear is  
14 because they're --

15                  THE COURT: Why aren't they just allegations of  
16 egregious misconduct?

17                  MR. KURTZ: I think 1) because Delphi pled them as a  
18 scheme, 2) that Delphi specifically referred to that conduct  
19 only in connection with this fraud claim and not in connect --  
20 specifically by subject matter, where it described efforts to  
21 circumvent the EPCA. It only included that in its fraudulent  
22 omission, Count IV. And then, dispositively, Your Honor  
23 specifically held that those were fraud averments in your  
24 decision.

25                  THE COURT: Where did I say that?

1 MR. KURTZ: Well, by -- well, there was an argument  
2 as to whether these are fraud averments, and Your Honor said  
3 yes, they are and I don't want to hear it, it's not a point if  
4 you --

5 THE COURT: I didn't say that. I said, as to fraud,  
6 you haven't pled with particularity.

7 MR. KURTZ: Well, I think --

8 THE COURT: I didn't say all these other -- in fact,  
9 I said just the opposite as far as the other contentions.

10 MR. KURTZ: No, there was a discussion between you  
11 and Mr. Shore at the time where you said these allegations  
12 really go to the ability to satisfy a financing condition in  
13 the EPCA, and you said no, they're not, they're referenced and  
14 it may not be specific, but by saying I reallege I through CXX,  
15 or whatever it was at the time, that's fraud, and don't tell me  
16 or ask me to limit the use of those allegations. And when  
17 Mr. Shore tried to suggest it again, you said don't go there,  
18 that's not a point.

19 THE COURT: But that's to establish a particular  
20 claim. It doesn't mean that they're limited to saying that  
21 they're fraud claims for everything else.

22 MR. KURTZ: No, but they are an alleged fraudulent  
23 scheme, and I think the fact that Delphi is, in its last two  
24 briefs and here today, telling you you ought to reinstate the  
25 fraud claim on the basis of those allegations tells you that

1       they're trying to plea them as fraud allegations, if there's  
2       supposed to be some scheme.

3                     THE COURT: Well, they want those too. Yeah, they  
4       want to establish fraud too but that doesn't mean that they --  
5       I guess my point is, in the case law on equitable subordination  
6       and Kalisch-Jarcho and the like, it doesn't require fraud and  
7       veil piercing; it requires wrongful and egregious misconduct.  
8       Why wouldn't that be the case here?

9                     MR. KURTZ: Well, in other words, for purposes of  
10      fraudulent omission, do I need to address that there would need  
11      to be a particularity as to what these omissions were, these  
12      contacts with AIs? Because there's a Rule 9(b) issue --

13                  THE COURT: I don't -- I -- frankly, I think you lose  
14      on that point, but I think you probably do win on the duty  
15      point. So as far as fraudulent omission is concerned, I think  
16      in terms of particularity they probably crossed the line, but  
17      as far as duty they don't. Remember, the fraud here, as  
18      alleged, was the failure to disclose these problems, not --  
19      they don't have to plead in detail what all those problems are  
20      because that's -- I think that goes to scienter. So they had  
21      to plead enough to establish or lead to a strong inference of  
22      opportunity and motive.

23                  But I think that you've persuaded me that, as far as  
24      a duty in December, January, February, there's not a  
25      separate -- there's no basis under Michigan law for that duty.

1       But, to me, that highlights, I think, the difference between a  
2       fraud claim and rights under 510 or veil piercing or Kalisch-  
3       Jarcho --

4                   MR. KURTZ: I understand.

5                   THE COURT: -- which, to my mind, go more to a more  
6       amorphous concept that recognizes rights extraneous --  
7       specifically recognizes rights extraneous to a contract when  
8       it's alleged people do really bad things.

9                   MR. KURTZ: I understand, and let me address it this  
10      way. And I think you phrased this at the last hearing as,  
11      absent secrecy, would these allegations give rise to these  
12      claims or permit you to sustain them? And I think the answer  
13      is they did not and they cannot. And I say they did not  
14      because we're not on --

15                  THE COURT: But, yes, I think it's somewhat important  
16      that their case is vitiated -- their case is strengthened by  
17      the fact that this was kept secret, it's allegedly kept secret,  
18      but it would seem to me that egregiousness can have in it an  
19      element of secrecy without saying that that's fraud.

20                  MR. KURTZ: No, what I was saying by "it didn't" is  
21      that Your Honor sustained these claims on the basis of what you  
22      characterized as, quote, "jaw-dropping behavior", behavior that  
23      you said was potentially a bankruptcy crime.

24                  THE COURT: But that included in it an element of  
25      secrecy.

1 MR. KURTZ: And I'm not quarreling with the secrecy  
2 element; I'm quarreling with the under -- right, when you have  
3 a secrecy-based claim, what you have is some underlying conduct  
4 and then you have a failure to talk about that underlying -- or  
5 disclose or actively concealing --

6 THE COURT: Right.

7 MR. KURTZ: -- depending upon what law applies.

8 THE COURT: Right.

9 MR. KURTZ: And I'm trying to focus, at this  
10 juncture, on the underlying conduct, not on whether it was  
11 disclosed or not disclosed, whether there was a duty or not a  
12 duty. And what I'm saying is that Your Honor said there was  
13 jaw-dropping behavior, and you identified that specifically --

14 THE COURT: Right.

15 MR. KURTZ: -- as the effort to circumvent the EPCA  
16 by chilling the financing and --

17 THE COURT: Right.

18 MR. KURTZ: -- and causing the short-selling, which  
19 in turn chilled the financing. It was the effort to prevent  
20 the occurrence of a condition, of a financing condition. And  
21 there are no allegations. That's the legally --

22 THE COURT: But this is not your motion. I've  
23 already dealt with this issue. Your motion was to say that I  
24 should reconsider my ruling because the elements of it that  
25 dealt with equitable subordination and veil piercing and

1 Kalisch-Jarcho all were premised upon an integral fraud  
2 component. And I've looked at that and considered that, and I  
3 just don't see that they are premised on an integral fraud  
4 component.

5 MR. KURTZ: But at this juncture, and it's important,  
6 obviously, for the orderly administration of the case and how  
7 we can all move forward here, is you have now a footnote 7  
8 before Your Honor which purports to tell you what we could  
9 particularize.

10 THE COURT: No, this -- I don't -- the orderly  
11 administration of the case is that people make motions and I  
12 consider them. Your motion was based on Rombach v. Chang. It  
13 wasn't based on "Judge, you read the complaint wrong."

14 MR. KURTZ: Well, what I was -- the conduct at  
15 issue -- Your Honor looked at under Rule 8. So if you want me  
16 to go back and say why I think it's Rule 9, even for these --  
17 going back to Rombach, then, Your Honor, these are -- they're  
18 fraud allegations. They're made in connection with fraud  
19 allegations. It's a fraudulent omission claim. A fraudulent  
20 omission claim requires that the plaintiff identify what the  
21 omissions were, and I've cited a number of cases in this  
22 jurisdiction and outside of this jurisdiction that says what  
23 that means. That means the what, who, how and why, who was  
24 participating. The law with respect to Rule 9(b) is that you  
25 protect defendants from improvident charges of wrongdoing.

1                   THE COURT: The who is addressed to who was not  
2 making the disclosure.

3                   MR. KURTZ: Well, the who, Your Honor -- technically,  
4 some of the cases would require you to say exactly what meeting  
5 was a particular person. But I'm not focusing on that, right?  
6 I'm focusing on what's the conduct at issue. The conduct at  
7 issue, and Your Honor called this the "back and forth", that's  
8 your language, between Appaloosa and the additional investors,  
9 that would have been this chilling conduct.

10                  So just saying they are legally responsible for --

11                  THE COURT: No, I'm not -- I could tell you right  
12 now, and it's confirmed by Mr. Friedman's response to me, which  
13 was pretty candid, that phrase has no bearing in my ruling.  
14 It's not --

15                  MR. KURTZ: Okay, but there are no other factual  
16 allegations under Rule 9.

17                  THE COURT: Well, I disagree with you on that.

18                  MR. KURTZ: Well, maybe I could address them with  
19 more specificity if I was aware -- I'm aware of allegations  
20 that there was some consideration about whether or not to  
21 perform, whether to breach in the event that there was a  
22 satisfaction of the conditions. What -- the behavior that has  
23 supported these claims was an affirmative effort to circumvent  
24 their ability to get the financing, which --

25                  THE COURT: I guess -- again, I come back to this

1 basic point, which is what is it that confines my ruling  
2 necessarily to a fraud-based claim on these three points:  
3 equitable subordination, veil piercing and Kalisch? First, the  
4 law doesn't require it. The law doesn't require fraud to  
5 establish any of those three points.

6 MR. KURTZ: Correct.

7 THE COURT: So it has to be some other -- it has to  
8 be --

9 MR. KURTZ: That's right.

10 THE COURT: -- a factual thing in the complaint.

11 MR. KURTZ: Well, what it is is averments of fraud  
12 have to be pled with particularity no matter what the claim is.  
13 That's the fundamental basis for the motion, and that's  
14 Rombach. So the question then becomes, well, are these  
15 averments of fraud?

16 THE COURT: But only if the claim depends upon it.

17 MR. KURTZ: No. That's exactly what Rombach says is  
18 not the law, right? Rombach tells you that it doesn't matter  
19 if it's a part of a constituent element of the claim; it just  
20 matters that it's an averment of fraud. So that's why it  
21 applies in negligence claims, Section 11 claims, breach of  
22 fiduciary claims.

23 THE COURT: No, but only if the negligence is  
24 dependent upon the fraud.

25 MR. KURTZ: No, if it has a fraud character, if it is

1 a fraud averment and --

2 THE COURT: A fraud-based averment, yes.

3 MR. KURTZ: Exactly, and --

4 THE COURT: But this -- why are these fraud-based  
5 averments?

6 MR. KURTZ: Because they've been alleged as fraud-  
7 based averments, right?

8 THE COURT: Okay.

9 MR. KURTZ: They've been alleged as a scheme, as a  
10 plan, as a fraud, and --

11 THE COURT: Well, why are schemes and plans frauds?

12 MR. KURTZ: Well, because in this case that's what  
13 the plaintiff alleged. In this case, Your Honor upheld and  
14 ruled, in the first instance, on those claims on the basis of  
15 fraud, and at this point Delphi is trying to reinstate the  
16 claim on the basis of fraud.

17 THE COURT: Well, if I had done that, then these  
18 claims wouldn't have been -- they would have been dismissed  
19 because I said the fraud claims are dismissed. I didn't --

20 MR. KURTZ: You said the fraud --

21 THE COURT: -- I didn't say they've established a  
22 fraud here in connection with 510, did I?

23 MR. KURTZ: But you described, as two alleged frauds,  
24 the fraud that related to the concealment and the fraud that  
25 related to the intent --

1 THE COURT: Right.

2 MR. KURTZ: -- not to perform, and it was with --

3 THE COURT: But that's when I was talking about  
4 fraud.

5 MR. KURTZ: But the cases tell you that it's not just  
6 what you're talking about; it's the part of the fraud. If you  
7 have a fraud that says -- and you've got a standard on this  
8 fraud that tells you you have to have bad conduct, right? You  
9 need to have somebody -- you have to have the information. The  
10 information is somebody went and spoke to somebody else and  
11 said this is a bad company, don't give them financing and, by  
12 the way, go short your stock because that'll hurt their stock  
13 price and they won't be able to raise financing. Then you have  
14 to have a duty to disclose and a failure to disclose, all of  
15 that subject to particularity, including the first element.

16 I don't see how you can say, well, these are the  
17 necessary elements of a fraud claim, they've been pled as  
18 fraud, they've been described as fraud, but somehow when you  
19 pull them out of the fraud claim and you've realleged them in a  
20 claim that doesn't require fraud that you don't have to apply  
21 the same standard for particularity. And that's what  
22 Rombach -- that's what all the cases we've cited -- these cases  
23 have been applied in negligence and in Section 11 and in breach  
24 of fiduciary duty in all these types of claims, even though  
25 they don't have a fraud element and even though they weren't

1 advancing them as fraud.

2 And also, Your Honor, it's a fraud -- a scheme is an  
3 element of fraud. You have fraudulent schemes and activities,  
4 you have fraudulent misrepresentation claims and you have  
5 fraudulent omissions. They're alleging all of that. And in  
6 the end, I just don't see how an allegation that somebody -- a  
7 conclusory assertion about legal responsibility, which I think  
8 you're not crediting, is -- maybe Your Honor can -- is it  
9 possible that the Court could explain to me which -- what  
10 factual allegation you think there is with respect to  
11 circumventing the EPCA so I could try to address it? Because  
12 I've been through that complaint, and I'm aware of nothing  
13 other than meetings where there were discussions about the  
14 prospect of not closing, whether that was a breach or not and  
15 how you'd finance the breakup fee to the extent that there was  
16 a willful breach. I'm not aware of any allegation that --  
17 except an exculpatory one in paragraph 78, in which Delphi says  
18 yeah, of course, Appaloosa's too smart to do this but they're,  
19 quote, "legally responsible", the consummate legal conclusion.  
20 I'm not aware of a factual allegation to support the claims.  
21 And I'm not aware they have a good faith basis to make one.  
22 There's no allegation different as to Appaloosa than any other  
23 defendant in this case. There's been a lot of inflammatory  
24 allegations about securities law violations and bankruptcy law  
25 crimes, chilling financing, preventing the consummation of a

1 condition, the satisfaction of a condition, but all we see from  
2 the discovery and from the actual factual --

3 THE COURT: No, no, no.

4 MR. KURTZ: -- allegations in the complaint --

5 THE COURT: Don't get into that.

6 MR. KURTZ: Well, okay.

7 THE COURT: Don't get into that.

8 MR. KURTZ: But it was put before Your Honor by  
9 Delphi, not by us.

10 THE COURT: Not the whole record, and I didn't read  
11 that because it wasn't what people are supposed to do. And so  
12 I didn't read what you said in response to it either --

13 MR. KURTZ: Okay. I mean we --

14 THE COURT: -- because that's not -- I don't take  
15 snippets of depositions and make rulings on motions to dismiss  
16 based on snippets of depositions.

17 MR. KURTZ: Understood, but in a practical sense,  
18 when trying to determine whether something that has already got  
19 significant defects should continue to be alive -- I don't see  
20 a complaint factual allegation against Appaloosa that would  
21 support the conclusory assertion about an effort to circumvent  
22 the EPCA. All I've seen in the factual allegations relates to  
23 thinking about not closing, which is not actionable.

24 So all these claims would be sustained on the basis  
25 of all I can see, the, quote, "legal responsibility", which I

1 think Your Honor has already determined wouldn't be sufficient.

2 THE COURT: I'm sorry. What about responsibility?

3 I'm sorry.

4 MR. KURTZ: The legal -- the --

5 THE COURT: Oh, right. The duty.

6 MR. KURTZ: -- language of legal responsibility.

7 THE COURT: The duty.

8 MR. KURTZ: Well, I was making the point under  
9 paragraph 78 where they say Appaloosa wasn't involved in this  
10 bad conduct but is, quote --

11 THE COURT: Well, no. They alleged that Appaloosa  
12 knew about this. They alleged that Appaloosa knew what the  
13 investors were up to.

14 MR. KURTZ: Well -- but they don't allege how  
15 Appaloosa was aware. They don't give you any particularity,  
16 that it's just a -- it's a boilerplate --

17 THE COURT: Where do they -- Appaloosa knew. What  
18 more particularity do they need to give on that?

19 MR. KURTZ: How? How did --

20 THE COURT: They knew.

21 MR. KURTZ: But, Your Honor, I think the cases, and  
22 we can -- we're probably about to be shot to say that we would  
23 put in an eleventh or a twelve brief here, but the cases are  
24 pretty clear that you can't just say somebody had knowledge.

25 You're going to have to have some basis for knowledge, like you

1 met with this person and they told you. You can't just --  
2 anybody can say of course you knew. Well, how? How does  
3 Appaloosa know what --

4 THE COURT: I don't --

5 MR. KURTZ: -- an independent third party is doing?

6 THE COURT: I don't see that. I don't see that in  
7 the cases.

8 MR. KURTZ: In the cases or the --

9 THE COURT: Yeah.

10 MR. KURTZ: Because I think we can cite you the cases  
11 that would tell you that conclusory assertion of knowledge,  
12 without providing any factual basis to assert how you became  
13 aware, because anybody can claim -- why not just -- you know,  
14 the allegation is that Delphi knew. I mean, you have to say  
15 how. You're a third party; you're not privy to the activity.  
16 So you don't have a basis for knowing.

17 THE COURT: Well, they certainly say that they were  
18 meeting with these investors over a lengthy period, and they  
19 identified various meetings.

20 MR. KURTZ: But they've never identified that at a  
21 particular meeting an additional investor turned --

22 THE COURT: But where do they need that?

23 MR. KURTZ: Well, certainly under Rule 9.

24 THE COURT: Where do they need it under the case law?

25 MR. KURTZ: Certainly under Rule 9.

1 THE COURT: No. Not under Rule 9.

2 MR. KURTZ: Yeah, well, you --

3 THE COURT: I don't see that.

4 MR. KURTZ: Your Honor, Rule 9 requires particularity  
5 as to knowledge.

6 THE COURT: As to what? As to what?

7 MR. KURTZ: As to knowledge. As to knowledge.

8 THE COURT: No.

9 MR. KURTZ: As to --

10 THE COURT: As to -- it, in fact, does not on its  
11 plain terms. It says, as to scienter, you don't need  
12 particularity. You need facts enough to create -- to raise an  
13 inference, and that includes motive and opportunity. And they  
14 certainly allege motive and opportunity up the wazoo in this  
15 complaint.

16 MR. KURTZ: Motive and opportunity, in itself,  
17 without any factual allegations creating the strong inference  
18 of scienter, is insufficient. Anybody can say you would have  
19 benefited, although God knows how they would have. Anybody  
20 would benefit --

21 THE COURT: The motive would -- they allege lengthy  
22 and concerted discussions with people about -- and, again,  
23 these are the investors that Appaloosa has brought into the  
24 deal and is funneling the information to about the concerns  
25 about the deal and wanting to blow it up. But, to me, that's

1 fairly particular as far as the lesser requirement under Rule  
2 9(b) with regard to scienter.

3 MR. KURTZ: Your Honor, all I can submit on this  
4 is --

5 THE COURT: You're assuming that it applies here as  
6 opposed to just having to show egregiousness.

7 MR. KURTZ: Well, yeah, I mean, I'm assuming that,  
8 for purposes of this discussion, that it's a fraud averment and  
9 that as a fraud averment you would be required to demonstrate  
10 some basis for knowledge other than you met. You would have to  
11 say you met and they disclosed something to you. You have to  
12 make that in good faith under Rule 11.

13 We're trying to resolve all of this.

14 THE COURT: Well, they'd say you didn't know it. I  
15 mean, yes, you do have Rule 11 but that's what they say. They  
16 say in the complaint --

17 MR. KURTZ: But we've been trying --

18 THE COURT: -- that Appaloosa did know that these  
19 people were up to this bad stuff, bad conduct. Appaloosa knew  
20 it.

21 MR. KURTZ: I'm not --

22 THE COURT: They didn't -- they'd say Appaloosa  
23 didn't do it itself but they also say it didn't need to do it  
24 itself to blow up the deal.

25 MR. KURTZ: But being an alleged third-party

1       beneficiary is a far cry from tortious conduct, right? I don't  
2       see anything where they've said you knew it because they told  
3       it to you, as opposed to just telling you that we'd like to not  
4       close because it's a bad investment. I see allegations of  
5       knowledge as to that. I don't see allegations of knowledge  
6       that we are shorting and we are chilling the financing and we  
7       have told you --

8                  THE COURT: Isn't that what lawsuits are about is to  
9       decide whether it's one or the other?

10                 MR. KURTZ: No. I think lawsuits and a motion to  
11       dismiss is about making good faith factual allegations that we  
12       can respond to, and that's not in there that they're --

13                 THE COURT: Well, can't you respond to say we didn't  
14       know since that's what this is premised upon in paragraph 130?

15                 MR. KURTZ: Only after --

16                 THE COURT: That's pretty easy for you to do.

17                 MR. KURTZ: -- only after engaging in how much more  
18       discovery. We have been singled out among defendants to be  
19       subject to --

20                 THE COURT: Right.

21                 MR. KURTZ: -- a different set of claims with  
22       different liabilities without any basis for the allegations. I  
23       think there are allegations of knowledge that the AIs had  
24       questions about the transaction.

25                 THE COURT: They don't say that the other investors

1 knew this.

2 MR. KURTZ: Well, they actually do, right, Your  
3 Honor? They say "and other additional investors".

4 Everybody -- they just use one name and all the names, but the  
5 conduct is no different.

6 THE COURT: No. No. In paragraph 130, they say  
7 Appaloosa concealed from Delphi. They don't say the other  
8 investors.

9 MR. KURTZ: Yeah, but if you look at paragraph 78,  
10 they say additional investors. They brought the fraud claim  
11 against Appaloosa, but the --

12 THE COURT: Well, all right. I'm reading the whole  
13 complaint, including paragraph 130.

14 MR. KURTZ: But --

15 THE COURT: I understand what they say in paragraph  
16 78.

17 MR. KURTZ: -- but all these allegations, you're  
18 suggesting, support these other three claims at issue, and that  
19 was brought against each of the defendants, and these same  
20 allegations were made. And the knowledge allegation is that  
21 you had knowledge of shorting or that you had knowledge of  
22 active misconduct in an effort to prevent the satisfaction of a  
23 financial condition, is knowledge, effectively, that the AIs  
24 don't want to close if they don't have to close because it's a  
25 bad investment, which is a far cry from fraud, egregious

1 misconduct.

2 And, in fact, Your Honor, we're talking about the  
3 Solo claim effectively, the Jarcho-Kalisch (sic) claim, and  
4 that case tells you breach of contract is insufficient, right?  
5 You're entitled to breach.

6 THE COURT: No, it doesn't say that. It says that  
7 you don't even need to breach the contract. It says all you  
8 need to do is act badly.

9 MR. KURTZ: It says you have to -- let me read it so  
10 that I don't end up misquoting. What it says, though, Your  
11 Honor, is that you have a right to breach the contract, and  
12 that'll never give rise to liability --

13 THE COURT: You're never going to convince me that  
14 people just have rights to breach contracts. I'm sorry. You  
15 didn't buy an option here. Your clients didn't get an option,  
16 all right? They may think that getting out of the deal was the  
17 best money they ever spent, but that doesn't --

18 MR. KURTZ: I understand. I --

19 THE COURT: It's neither here nor there.

20 MR. KURTZ: -- I'm not suggesting it's an option; I'm  
21 suggesting that whether or not it's a defense to the viability  
22 of a liability limitation. And if you look at Solo, where it  
23 required conduct that approximated economic duress, it says,  
24 quote, "The option to breach a contract and pay damages is  
25 always available even where the breaching party had no

1 intention of performing its obligations when it entered into  
2 the agreement." It went on to say that the operative  
3 distinction is -- talking about Noble Lounge (ph), which I'll  
4 get to, is it didn't breach the contract. It goes on to say,  
5 "Solo's economic self-interest, the pertinent inquiry is  
6 whether the fee sought from BAS is a matter of Solo's  
7 legitimate economic self-interest or, alternatively, whether it  
8 evinces the intent to inflict economic harm."

9 THE COURT: We're getting very far afield here. This  
10 is way beyond your motion, and I think I've heard enough on  
11 this point. Do you have anything that addresses the motion  
12 itself?

13 MR. KURTZ: Well, Your Honor, what I guess I'm trying  
14 to establish is I think you've asked us whether those -- we've  
15 made a motion that we had to be treated identically with  
16 respect to all these claims and what the allegations have to be  
17 to sustain these common law claims, and what I'm suggesting is,  
18 under Solo and the New York Court of Appeals decision in  
19 Metropolitan Life v. Noble Lounge, is that you have got to have  
20 conduct which is outside and is not a breach of contract, that  
21 a self-motivated economic interest in breaching cannot  
22 undermine the efficacy of a liability cap and that the  
23 plaintiffs can't have their cake and eat it too. They can't  
24 bring a Solo claim and then ignore that Solo says that a simple  
25 breach won't suffice. You have to bring economic duress that's

1 intended to inflict harm, not for your own self-interest but to  
2 harm the other party, which -- because that was just a hold-up  
3 case.

4 So I think if you have a Solo case, you've got to  
5 look at the Solo law, and the allegations in this complaint  
6 can't support.

7 THE COURT: Okay. Do the debtors have anything to  
8 say?

9 MR. FRIEDMAN: No, Your Honor.

10 THE COURT: Okay.

11 (Pause)

12 THE COURT: Okay. I have before me a motion by two  
13 of the defendants in this adversary proceeding, Appaloosa and  
14 ADAH, for reargument, which I granted, and to vacate a portion  
15 of my prior order in this case dated August 11, 2008 granting,  
16 in part, and denying, in part, motions by all the defendants to  
17 dismiss the complaint and for related relief.

18 The premise of the motion is that in my order I  
19 dismissed one of the two fraud claims raised by Delphi in its  
20 complaint, and that fraud claim went to alleged  
21 misrepresentations and fraudulent omissions made, or failed to  
22 be made, as the case may be, after the entry by Delphi and  
23 Appaloosa and ADAH into the EPCA agreement and the related  
24 funding agreement on Appaloosa's part.

25 I concluded that that latter type of fraud claim did

1 not pass muster under Rule 9(b) in that it did not set forth  
2 with particularity the who, what, where, when, why elements of  
3 the fraud claim.

4 It's clear to me, from my review of the complaint,  
5 that the complaint does not allege with any specificity any  
6 affirmative representation that Appaloosa or ADAH intended to  
7 close following or after Mr. Tepper's testimony, that is, for  
8 the period from early December through the scheduled closing  
9 date, April 4, 2008.

10 In light of that finding and that ruling, Appaloosa  
11 and ADAH moved to have the Court reconsider its rulings that  
12 all were premised upon portions of the complaint that also  
13 underlie the fraud claim. Those were paragraphs 71 through 84  
14 as well as 130 of the complaint.

15 The Court, in light of those paragraphs, concluded  
16 that it would not dismiss other claims against Appaloosa and  
17 ADAH, in particular, that it would not dismiss an equitable  
18 subordination cause of action, that it would not dismiss a veil  
19 piercing cause of action and that it would not dismiss or limit  
20 the damages claim and not dismiss the specific performance  
21 claim or cap the damages claim, as had been argued.

22 On the basis of what the parties have been referring  
23 to as the Kalisch-Jarcho doctrine, citing Rombach v. Chang,  
24 355 F.3d 164, 171 (2d Cir. 2004), Appaloosa contended that the  
25 foregoing three rulings, again, on equitable subordination,

1       veil piercing and Kalisch-Jarcho, all were premised upon fraud  
2       allegations and, therefore, that my ruling that the fraud  
3       allegation was insufficiently particularized and therefore  
4       should be dismissed also should apply to the other three  
5       rulings.

6                   Rombach v. Chang clearly stands for the proposition  
7       that under Rule 9(b) of the Federal Rules, which is  
8       incorporated by Bankruptcy Rule 7009, where a party has alleged  
9       fraud, whether or not as part of a fraud cause of action, Rule  
10      9(b) must be complied with.

11                  The next step in the course of this motion was my  
12       having some concern that I had too easily lumped together the  
13       dismissal of the affirmative misrepresentation claim and the  
14       fraudulent omission claim in light of the recognized difficulty  
15       of pleading certain elements, in particular, the time and  
16       nature of the alleged misstatement when the fraud is based not  
17       upon a misstatement but an omission.

18                  Consequently, I directed the parties to brief that  
19       issue and as to whether, in fact, the complaint did set forth  
20       sufficiently, under Rule 9(b), a fraudulent omission claim,  
21       since the primary element or the primary basis for the fraud  
22       claim was not statements made by Appaloosa or ADAH to the  
23       debtor but rather the failure to reveal information.

24                  The parties have done that, and I am satisfied, based  
25       on that briefing and oral argument, that, contrary to my

1 concern, the complaint does not set forth a fraudulent omission  
2 claim in this area either. I reach that conclusion, however,  
3 not because of my views as to the deficiency or alleged  
4 deficiency of the complaint as far as compliance with Rule 9(b)  
5 but rather under the applicable law here, which is the law of  
6 Michigan, my belief that with regard to these particular  
7 omissions, which, again, are omissions that allegedly took  
8 place between the date that the Court authorized Delphi's entry  
9 into the EPCA and the date of the closing, were omissions that  
10 Appaloosa and ADAH had a duty to disclose.

11 As stated in a number of cases, which the parties  
12 have both cited, Rule 9(b) does, in fact, of course, apply to  
13 allegations of fraudulent omissions. However, given that there  
14 is no speaker, the requirements of pleading are somewhat  
15 different for fraudulent omissions than affirmative  
16 misstatements or affirmatively fraudulent statements. For  
17 claims of fraudulent concealment, the complaint must specify:  
18 1) what the omissions were, 2) the person responsible for the  
19 failure to disclose, 3) the context of the omissions and the  
20 manner in which they misled the plaintiff, and 4) what  
21 defendant obtained through the fraud. And that's T.L.O. v.  
22 Monsanto Company, 522 F.Supp.2d 524 (S.D.N.Y. 2007).

23 Then, additionally, a concealment of facts supports a  
24 cause of action for fraud only if the nondisclosing party has a  
25 duty to disclose, *id.* citing Remington Rand Corporation v.

1                   Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 143 (2d Cir.  
2                   1995). Normally, such a duty arises where the parties are in a  
3                   fiduciary or other relationship, signifying a heightened level  
4                   of trust. Under Michigan law, a duty to disclose arises where  
5                   there is a half-truth or the allegedly nondisclosing party with  
6                   superior knowledge has been pressed for the truth and has not  
7                   responded in a truthful fashion.

8                   I conclude that since neither of those two  
9                   circumstances apply, the only two bases for a duty here would  
10                  be either a continuing duty based on Mr. Tepper's alleged --  
11                  I'm sorry, Mr. Tepper's testimony at the hearing on whether I  
12                  should approve, or not, Delphi's entry into the EPCA and/or  
13                  paragraph 6(d) of the EPCA, which I quoted earlier, which  
14                  requires each investor, including ADAH, to use its reasonable  
15                  best efforts to cooperate with Delphi and to consummate and  
16                  make effective the transactions contemplated by the EPCA.

17                  Based on the allegations in the complaint, it seems  
18                  to me that the Tepper testimony is not sufficiently linked to  
19                  or tied to the allegations in paragraphs 1 through 84 and 130  
20                  of the complaint. It also appears to me that the contractual  
21                  duty to use best efforts is just that, a contractual duty, and  
22                  should not give a basis independent from a breach of contract  
23                  claim for a duty to disclose that could give rise to a fraud  
24                  claim.

25                  So I don't believe that I erred in dismissing the

1 fraudulent omission cause of action on that basis. I do  
2 believe, however, that the allegations in paragraphs 71 through  
3 84 and 130 do have sufficient particularity with regard to  
4 setting forth, as set forth in the case law, what the omissions  
5 were, the person responsible, the context of the omissions and  
6 the manner in which they misled the plaintiff and what  
7 defendant obtained thereby.

8 First, I should note that the complaint does set  
9 forth a self-concealing set of communications between Appaloosa  
10 and the so-called additional investors. And under the Second  
11 Circuit case law, I believe that is sufficient to establish the  
12 first prong, which is that these were indeed omissions.  
13 Moreover, what was kept from Delphi, as alleged in the  
14 foregoing paragraphs, was a series of discussions pursuant to  
15 which it is alleged Appaloosa and the additional investors  
16 gamed out nonperformance of the agreement and nonperformance of  
17 the additional investors' funding of the agreement, including  
18 discussions of how they would protect each other or mitigate  
19 their own losses for failure to perform.

20 The complaint also alleges, in paragraph 130, that  
21 Appaloosa knew of the efforts of the additional investors to  
22 thwart the agreement and, as pled in the earlier paragraphs,  
23 those efforts concluded efforts to defeat the third party bank  
24 financing either directly or through depressing the value in  
25 the marketplace of Delphi.

1           The complaint says that Appaloosa, as the corporate  
2 entity, was the entity responsible for not making the  
3 disclosure. And I believe that is sufficient under the case  
4 law, although given Mr. Tepper's role, I believe that Appaloosa  
5 has sufficient notice to assume that it was Mr. Tepper who  
6 should have disclosed these alleged facts. See *Skydell v.*  
7 *Ares-Serono S.A.*, 892 F.Supp 498 (S.D.N.Y. 1995). See,  
8 generally, *Nine West Shoes Antitrust Litigation*, 80 F.Supp.2d  
9 181 (S.D.N.Y. 2000), as well as *International Telecom, Inc. v.*  
10 *Generadora Electrica del Oriente S.A.*, S.D.N.Y. -- I'm sorry,  
11 2002 WL 465291 (S.D.N.Y. 2002).

12           The context of the omissions, I believe, is clear  
13 from the complaint. The complaint sets forth in detail  
14 Delphi's decision to pursue an integrated series of  
15 transactions, all necessary to the consummation of its Chapter  
16 11 plan, premised in large measure upon the consummation of the  
17 EPCA and the related third-party financings. And the  
18 complaint, with some specificity, including covering the period  
19 in question as well as individual meetings, sets forth the  
20 alleged efforts by Appaloosa and the additional investors to  
21 thwart that result.

22           The complaint also sets forth the harm to Delphi from  
23 the efforts, and I believe that although Delphi alleges it was  
24 ready, willing and able to close, which assumes, of course,  
25 that it had in hand the third-party financing, clearly the

1 investors, other than Goldman Sachs, were not ready to close.  
2 And, in addition, one can certainly infer reasonably that the  
3 efforts to thwart the closing had damaged Delphi going forward.

4 As far as what defendant obtained by not revealing  
5 this information, again, I believe the complaint sets forth --  
6 it alleges, first, that Delphi paid substantial fees to  
7 Appaloosa and, secondly, that Appaloosa, by not revealing this  
8 information, kept to itself and therefore obtained the  
9 optionality, if you will, of this alternative course of not  
10 closing, which, if it had been revealed, could have been  
11 something that Delphi would have gone to the Court or directly  
12 to the parties, the third parties, to nip in the bud.

13 What does not need to be pled with particularity  
14 under Rule 9(b) are allegations of scienter, or knowledge on  
15 Appaloosa's part that these omissions would be fraudulent. But  
16 I believe that, given the context, Delphi has sufficiently  
17 alleged facts establishing scienter, namely motive and  
18 opportunity, which is what's required under Beck v.  
19 Manufacturer's Hanover Trust Company, 820 F.2d 46, 50 (2d Cir.  
20 1987). See, generally, Drexel Burnham Lambert Group, Inc. v.  
21 Microgenesys, Inc., 775 F.Supp 660 (S.D.N.Y. 1991), and In re  
22 Paine Webber Securities Litigation, 1992 U.S. Dist LEXIS 22855  
23 (S.D.N.Y. 1992). And see, generally, Powers v. British Vita,  
24 P.L.C., 57 F.3d 176 at 185 (2d Cir. 1995).

25 I reach these conclusions not based on any belief

1 that there should be a looser standard given that Delphi is a  
2 debtor in Chapter 11. That concept, generally speaking,  
3 applicable to trustees in bankruptcy, has been recognized by  
4 some of the cases, including cases cited by Delphi. But I  
5 believe, under the circumstances here, where what is involved  
6 is a post-petition transaction, it would be inapplicable.

7                 However, even under the normal standard, which,  
8 again, I believe should apply here, I believe that Delphi has  
9 pled with sufficient particularity, under the authorities I've  
10 cited, the allegations of fraud in paragraphs 71 through 84 as  
11 well as 130, and has also adequately pled knowledge or  
12 scienter. See also Nisselson v. Ford Motor Company, In re  
13 Monahan Ford Corporation, 340 B.R. (Bankr. E.D.N.Y. 2006).

14                 That somewhat begs the question as to whether the  
15 second part of my inquiry even matters, which is whether, in  
16 fact, allegations of fraud are necessary to sustain the causes  
17 of action of veil piercing and equitable subordination as well  
18 as to sustain my conclusion that the complaint should not be  
19 dismissed on those counts as against Appaloosa. Clearly, a  
20 fraud allegation is not necessary to establish subordination on  
21 an equitable basis under Section 510, although it clearly has  
22 to be egregious and severely unfair to other creditors, given  
23 that Appaloosa is not an insider. Similarly, fraud is not  
24 necessary to establish veil piercing.

25                 And finally, under Kalisch-Jarcho, fraud is not

1 necessary. As the Court of Appeals stated, as I quoted in the  
2 August order, "An exculpatory clause is unenforceable when, in  
3 contravention of acceptable notions of morality, the misconduct  
4 for which it would grant immunity smacks of intention of  
5 wrongdoing. This can be explicit, as when it is fraudulent,  
6 malicious or prompted by the sinister intention of one acting  
7 in bad faith. Or, when, as in gross negligence, it betokens a  
8 reckless indifference to the rights of others, it may be  
9 implicit." 58 NY2d 377, 385 (1983).

10 The allegations are clearly strengthened by the fact  
11 that the course of communications between the additional  
12 investors and Appaloosa are alleged to have been kept secret by  
13 Delphi as well as the allegation that Appaloosa knew and did  
14 not reveal to Delphi the efforts of the additional investors to  
15 subvert the transaction. I do not believe that they are  
16 necessary to sustain any of the three legal conclusions that I  
17 previously reached. The conduct, while potentially conduct  
18 that Delphi could have addressed and perhaps corrected, would  
19 have been just as bad if disclosed. So it seems to me that  
20 even if Delphi had not pled the maintenance of the secrecy of  
21 this conduct with sufficient particularity, it would still have  
22 set forth causes of action under 510 and veil piercing law as  
23 well as sufficient facts under the Kalisch-Jarcho line of cases  
24 to sustain my ruling.

25 Again, as stated in my August ruling, the complaint

1 need not state a specific legal theory. It may even  
2 incorrectly state it if it alleges sufficient facts to support  
3 a claim. Whether or not Appaloosa's correct that it misstated  
4 its legal theory or incorrectly stated it, the complaint did  
5 set forth, in addition to incorporating the relevant documents,  
6 in matters of which I can take judicial notice, sufficient  
7 facts to support the three contentions that I've just  
8 described.

9 So for those reasons, I will deny Appaloosa's and  
10 ADAH's motion, and counsel for the debtors should submit an  
11 order consistent with my ruling. I don't believe the order  
12 needs to address the fraudulent representation point since that  
13 was a matter that I had brought up sua sponte, and I've reached  
14 the conclusion that my initial ruling denying the fraudulent  
15 transfer claim -- I'm sorry, the fraudulent omission claim or a  
16 fraudulent concealment claim was correct, albeit on a somewhat  
17 different rationale.

18 So, Mr. Friedman, you should submit that order. You  
19 don't need to settle it, but you should provide -- advance a  
20 copy of it to Mr. Kurtz.

21 MR. FRIEDMAN: I will do that, Your Honor.

22 THE COURT: Okay. Thank you.

23 MR. FRIEDMAN: Your Honor?

24 THE COURT: Yes.

25 MR. FRIEDMAN: Just a quick scheduling issue on

1 setting a time that's convenient for Your Honor to deal with  
2 discovery issues. Discovery is progressing. We've ended up, I  
3 think everybody, back-loading depositions. So hopefully we can  
4 all meet the deadlines that are set out. But there are some  
5 limited disputes that have arisen regarding the sequencing of  
6 depositions, the extent to which attorneys who worked on the  
7 drafting of the various contracts or were in meetings can  
8 testify, the disclosure to clients of the identities of the  
9 confidential informants and some other issues.

10 I think -- we've been discussing it. We haven't been  
11 able to reach resolution. I think we can discuss it more, and  
12 I think both sides would be able to submit letters to Your  
13 Honor. But would you want to set a conference for that? Would  
14 you like to set a conference call? And when would you like to  
15 do that?

16 THE COURT: Well, let me -- this is just -- I'm not  
17 sure we have all the -- I see some of the other defendants'  
18 counsel here. Is this just an issue that affects Appaloosa and  
19 Delphi or does it affect the other defendants as well?

20 MR. FRIEDMAN: I think it affects the other  
21 defendants, but I'm pretty confident -- actually, I think we  
22 probably have everyone here, but as far as just setting a date  
23 when people would submit letters to the Court and a time when  
24 we could discuss it.

25 THE COURT: All right. Are you really at an impasse

1 on -- have you identified the issues that you are at an impasse  
2 on?

3 MR. WEINTRAUB: We've identified some issues. We're  
4 still talking. So I think -- I don't have a problem with --

5 THE COURT: All right.

6 MR. WEINTRAUB: -- setting a schedule for submission  
7 of the dispute.

8 THE COURT: All right. My practice in discovery  
9 disputes is to push the parties as hard as I can to resolve as  
10 many issues as they can between themselves. And sometimes when  
11 I set a date, people tend to put down their pens and stop  
12 calling each other. So I'm going to give you a date, but I'm  
13 going to give you a date but I'm going to preface it by saying  
14 I really expect you all to try to work out as much as you can  
15 reasonably do in advance, and then give me letters on things  
16 that clearly are legitimate areas of dispute.

17 Is there -- have you agreed on a discovery cut-off  
18 date?

19 MR. FRIEDMAN: Yes, Your Honor.

20 THE COURT: Are we working back from a certain date  
21 here?

22 MR. FRIEDMAN: Fact discovery cut-off date is  
23 December 31.

24 THE COURT: December 31?

25 MR. FRIEDMAN: Yes.

1           THE COURT: Okay. So I could give you -- you could  
2       give me letters on the 12th, and I can do something  
3       telephonically on the 14th. My guess is that that will  
4       probably narrow down three-quarters of the issues. There may  
5       be something I'll have to actually have a hearing on, for  
6       example, counsel testifying and the like --

7           MR. FRIEDMAN: Right.

8           THE COURT: -- my guess, although maybe you'll be  
9       able to resolve that since there are people on both sides.

10          MR. FRIEDMAN: Your Honor, could I ask -- I'm not  
11       available on November -- you're talking November, correct?

12          THE COURT: Yeah.

13          MR. FRIEDMAN: I'm not available November 14th.  
14       Could it go to Monday, November 17th?

15          THE COURT: Yes. And then why don't you give me  
16       letters on the 13th then? It'll give you an extra day, give me  
17       an extra day. If you could do it by 4 so I can focus on them  
18       on Friday. And then we'll have a call -- let's tentatively  
19       schedule it for Monday at 3. But you should check with the  
20       other parties to see if they're available for that.

21          MR. FRIEDMAN: Certainly.

22          THE COURT: If they're not but they're available in  
23       the morning, then I could do it in the morning.

24          MR. FRIEDMAN: Very good.

25          THE COURT: Okay.

1 MR. FRIEDMAN: Your Honor, just so we're clear, on  
2 Monday, the 17th, are we having a telephone call at 3?

3 THE COURT: A conference call, so --

4 MR. FRIEDMAN: A conference call.

5 THE COURT: -- one of you should set that up.

6 MR. FRIEDMAN: Okay.

7 THE COURT: I hope that I won't need to have a full  
8 hearing on any of these, I may, but I'm hopeful that I'll be  
9 able to, with your help, narrow down most of the issues and  
10 that if we need a hearing it would be shortly thereafter. It'd  
11 just be two or three days thereafter, is my guess.

12 MR. FRIEDMAN: All right. We'll set -- plaintiff  
13 will set up the call, Your Honor.

14 THE COURT: Okay.

15 MR. KURTZ: Thank you, Your Honor.

16 THE COURT: Okay.

17 (Proceedings concluded at 12:04 p.m.)

18

19

20

21

22

23

24

25

66

1

2

3

4

I N D E X

5

RULINGS

6

Page Line

Motions denied 61 9

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

67

1

2 C E R T I F I C A T I O N

3

4 I, Clara Rubin, court approved transcriber, certify that the  
5 foregoing is a correct transcript from the official electronic  
6 sound recording of the proceedings in the above-entitled  
7 matter.

8

9

\_\_\_\_\_ November 7, 2008

10 Signature of Transcriber

Date

11

12 Clara Rubin

13 typed or printed name

14

15

16

17

18

19

20

21

22

23

24

25

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400